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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER RECOUVREUR, Plaintiff, v. CHARLES CARREON, Defendants.	CASE NO. 3:12-CV-03435 RS **EX PARTE MOTION PURSUANT TO F.R.CIV.P. 6(b); DECLARATION OF CHARLES CARREON**

MOTION

Pursuant to F.R.C.P. 6(b) and Local Rule 6-3, defendant moves the Court *ex parte* for an order extending the time to file his opposition to the plaintiff's Motion for Award of Attorney Fees (Docket # 42).

The legal grounds for moving *ex parte* are that Rule 6(b) authorizes the filing of an *ex parte* application to extend time for performing any act required under the rules when the application is filed prior to the expiration of the time for performing the act. This motion is based on the attached Memorandum of Points and Authorities, the facts set forth in the Declaration of Charles Carreon, and the proposed Order submitted herewith.

Dated: January 14, 2013

CHARLES CARREON, ESQ.

s/Charles Carreon/s
CHARLES CARREON (127139)
Attorney pro se for defendant

MEMORANDUM OF POINTS AND AUTHORITIES

1. Rule 6(b)

Federal Rule of Civil Procedure 6(b) provides:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order.

Local Rule 6-3 provides:

> Motion to Change Time
>
> (a) Form and Content. A motion to enlarge or shorten time may be no more than 5 pages in length and must be accompanied by a proposed order and by a declaration that:
>
> (1) Sets forth with particularity, the reasons for the requested enlargement or shortening of time;
>
> (2) Describes the efforts the party has made to obtain a stipulation to the time change;
>
> (3) Identifies the substantial harm or prejudice that would occur if the Court did not change the time; and
>
> (4) If the motion is to shorten time for the Court to hear a motion: (i) Describes the moving party's compliance with Civil L.R. 37-1(a), where applicable, and (ii) Describes the nature of the underlying dispute that would be addressed in the motion and briefly summarizes the position each party had taken.
>
> (5) Discloses all previous time modifications in the case, whether by stipulation or Court order;
>
> (6) Describes the effect the requested time modification would have on the schedule for the case.

2. Summary of Argument

Plaintiff has stipulated to allow an extension of time for defendant to file a response to the Motion for thirty days; however, Defendant requires more time than that to prepare an opposition to the motion:[1]

- Requires thorough briefing,
- Will be better briefed by allowing discovery into relevant facts,

[1] The motion is meritless; however, as the argument below explains, that only makes it more dangerous, both for the defendant, and the trademark community that will suffer from an inadequately briefed opposition.

- May attract interest from trademark stakeholders wishing to submit amicus briefs that are being solicited by counsel.

There have been no prior continuances of the motion, plaintiff has attempted to resolve the matter by stipulation without success, and since the merits of the case have been resolved by entry of judgment, and ***defendant has paid the judgment already***, the requested continuance will not delay resolution of the action.

3. Background

Defendant was sued last year by plaintiff, represented by Paul Levy of Public Citizen to preemptively secure plaintiff's purported right to launch a parody website using defendant's name in a website domain name: Charles-Carreon.com. (Carreon Dec. ¶ 2.)

Because Mr. Levy has chosen, throughout the litigation, to use the threat of attorney's fees accruing at the rate of $700/hr as a bargaining chip, and not because of the merits of the case, that were in no way an open-and-shut matter, defendant chose to tender a Rule 68 Offer of Judgment that Mr. Levy accepted, allowing the entry of a declaratory relief judgment and a judgment for costs in the amount of $725. (Carreon Dec. ¶ 3.)

Defendant has paid the judgment. (Carreon Dec. ¶ 4; Exhibit 1.)

Mr. Levy contends that the declaratory relief action he filed in anticipation of a potential Lanham Act suit grants Lanham Act jurisdiction, and that in obtaining judgment, he has obtained an extraordinary result that warrants an award of $40,115 in attorney's fees. However, as plaintiff's motion defendant did not threaten a Lanham Act trademark action, but rather a cybersquatting action, that have never been found to be extraordinary from the defense side (the side Mr. Levy's client would be on here if defendant had in fact ever filed a cybersquatting action). Mr. Levy's brief in support of the motion for fees does not cite any case in which a prevailing cybersquatting defendant was awarded fees under the Lanham Act.

Mr. Levy attempts to conjure the image of plaintiff as a bad man for not waiving service of the summons and complaint, but even when cybersquatting defendants entirely default, that will not establish the finding of "maliciousness, willfulness, deliberateness, or bad faith" that is required to establish "extraordinariness" in a Lanham Act case. As the Hon. John F. Anderson in

the Eastern District of Virginia observed last year in an *in rem* cybersquatting case against a defaulting defendant:

> "It would be illogical to find that a failure to appear in an in rem proceeding under the ACPA may form an independent basis for an award of attorney's fees under the Lanham Act — to do so would convert all ***unanswered ACPA claims (which are in no way exceptional)*** into 'exceptional' cases."
>
> *United Air Lines, Inc. v. Unitedair.com,* 2012 U.S. Dist. LEXIS 95536 (E.D. Va. June 11, 2012) (emphasis added).

However, Mr. Levy is a man on a mission – a mission to create a rule that will allow him to turn Internet gripe sites into profit centers for him and Public Citizen Litigation Group. So far, the courts are sending him away empty-handed, a fact that he has not revealed to the Court in his motion.[2]

In *Smith v. Wal-Mart Stores, Inc.,* N.D. Georgia, Case no. 1:06-cv-526-TCB, Mr. Levy represented the plaintiff in a declaratory relief action to for a client operating websites with names like WalQaeda.com and Walocaust.com. Wal-Mart counterclaimed under the Lanham Act and Georgia trademark laws. Mr. Levy's client prevailed via summary judgment, and Mr. Levy moved for attorney's fees under the Lanham Act. The Hon. Timothy C. Batten, Sr. denied the motion, applying the same standard applicable in this Circuit to find the case unexceptional:[3]

> "Smith must meet the Eleventh Circuit's standard of fraud or bad faith before the Court may award attorneys' fees pursuant to the Lanham Act. He has failed to do so. He makes no allegations of fraud, and in his brief he implicitly concedes that he has no evidence of bad faith. See Doc. 110-2 at 8 ("Wal-Mart's counterclaims may not have risen to the level of bad faith.") ; Doc. 112 at 7-8 (acknowledging that the Eleventh Circuit does not follow the "oppressive" or "deliberate" standard, but then arguing to that standard rather than to "bad faith"). As a result, Smith's motion for attorneys' fees pursuant to 15 U.S.C. § 1117(a) is hereby DENIED.
>
> Order at page 11. (Exhibit 3.)

In *Riley v. Dozier Internet Law*, E.D. Va. Case No. 3:08CV642-HEH,[4] where Mr. Levy engaged in a race to the courthouse, filing a declaratory relief action and then removing a state

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[2] Although there is no ethical rule requiring disclosure of adverse authority outside of the controlling jurisdiction, it is certainly the better practice. (Exhibit 2.)

[3] Judge Batten applied the Eleventh Circuit rule: "[A]n 'exceptional case' is one that can be characterized as 'malicious, fraudulent, deliberate and willful,' or one in which 'evidence of fraud or bad faith' exists." Order, attached as Exhibit 3, page 8. *Compare* with *Gallo v. Proximo Spirits, Inc.*, 2012 U.S. Dist. LEXIS 119890 (E.D. Cal. Aug. 23, 2012) (statute is used to award attorneys' fees to a prevailing plaintiff when the defendant's trademark infringement is "malicious, fraudulent, or willful.") , *citing Gracie v. Gracie,* 217 F.3d 1060, 1068 (9th Cir. 2000)

[4] The full memorandum opinion issued by Judge Hudson in *Riley v. Dozier Internet Law*, E.D. Va. Case No. 3:08CV642-HEH is attached as Exhibit 4 and referred to herein as *Riley*.

court trademark lawsuit arising out of the same dispute,[5] he did not even get the opportunity to present his case. The defendants in the declaratory relief case moved for dismissal, and the Hon. Henry E. Hudson dismissed the action, holding there was no subject matter jurisdiction:

> "Plaintiff also purportedly invokes the Lanham Act as a basis for federal question jurisdiction under 25 U.S.C. § 1331. Plaintiff states that his use of the names 'Dozier' and "Dozier Internet Law" on his websites do not amount to trademark infringement under the Lanham Act. [Fact citation.] He also alleges that his use of the names constitute fair use and is protected by the First Amendment. [Fact citation.] Plaintiffs assertions, however, do not confer subject-matter jurisdiction on the Court. They amount to nothing more than defenses to Defendants allegations in the Dozier Action and do not create an action arising under federal law."
>
> *Riley, citing King v. Marriott Int'l, Inc.*, 337 F.3d 421, 424 (4th Cir. 2003), affirmed on grounds of discretionary abstention in unpublished opinion, *Riley v. Dozier Internet Law, PC*, 371 Fed.Appx. 399; 2010 U.S. App. LEXIS 6081 (2010).

4. Argument

Defendant finds himself on the receiving end of a fees proceeding that arises from Mr. Levy's institutional dedication to somehow wring fees out of cases filed for clients whose only asset is the ability to discomfit trademark holders with gripe websites.

Mr. Levy has told defendant that if he loses this motion, he will appeal it, because he "loves to be on appeal." (Carreon Dec. ¶ 9.) Accordingly, this motion should be well-briefed, and supported by all relevant facts, because a denial of the motion may have to withstand *de novo* review on appeal. "We review *de novo* the district court's legal determination that an action is 'exceptional' under the Lanham Act." *Secalt S.A. v. Wuxi Shenxi Constr. Mach. Co.*, 668 F.3d 677, 687 (9th Cir. Nev. 2012)

The Court should allow defendant to learn how Mr. Levy managed to turn Mr. Recouvreur into a client less than 24 hours after defendant sent a demand letter to Register.com to ascertain Mr. Recouvreur's identity, and how he knew who Mr. Recouvreur was when his identity as the registrant of Charles-Carreon.com was masked from public view. (Carreon Dec. ¶ 11.) Since Public Citizen Litigation Group has presumably paid the litigation costs in this matter, with an evident eye to trying to extract fees from the defendant, and its attorney's fee agreement

[5] Judge Batten remanded *Dozier Internet Law, P.C. v. Riley*, Case No. 3:08CV643-HEH despite ***Mr. Levy's effort to turn an imagined award of attorneys' fees into damages:*** "Defendants urge this Court to find that the actual amount in controversy is more than $75,000 because the Complaint underestimates the amount of legal fees Plaintiff will incur…." (Memorandum Order Granting Plaintiff's Motion to Remand, Exhibit 5 at page 2.)

provides for an assignment of the right to collect attorney's fees, that would colorably violate the champerty statute, Cal. Business & Professions Code § 6129, that provides in relevant part: "Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor." The relatively cryptic time records attached to Mr. Levy's declaration mention only one telephone conversation with "Doe," *i.e.*, Mr. Recouvreur, at the outset of the case. (Exhibit DD to Levy's Fifth Affidavit, Docket # 42-1.) It is apparent that from Mr. Levy's viewpoint, this lawsuit is about pressuring defendant into settling from a fear of being bludgeoned with an inflated fee award, or checking the receptivity of the Ninth Circuit to a fee award theory that has been rejected by the Eleventh Circuit, and a theory of jurisdiction that has been rejected by the Fourth Circuit.

Defendant submits that it may not be appropriate for Public Citizen Litigation Group, a group that solicits funds for activity that is supposed to be for public benefit, to feed a gripe-site industry for the purpose of generating attorneys fees, and that if such a purpose is afoot, it would be relevant to the determination whether to award attorneys fees or not, a matter that is within the Court's discretion, even in a real "extraordinary" case. *Stephen W. Boney, Inc. v. Boney Servs.*, 127 F.3d 821, 825 (9th Cir. Cal. 1997), *citing Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166 (11th Cir. 1994)

Discovery should be allowed to take plaintiff's deposition to establish:

1. That the operation of Charles-Carreon.com as a gripe website has not brought any substantial benefit to himself or the public;
2. That he has never met defendant and conceived of animus towards defendant due to Internet postings about a case in which he was not personally involved;
3. That if he had not had had an attorney to file the instant action, he would not have hired one;
4. That if he had been compelled to give up the gripe website as a result of having no attorney to file this action, it would not have caused him any damage; and,
5. That defendant engaged in no conduct that could be legally interpreted as malicious, fraudulent, or willful.

Discovery should be allowed to propound a subpoena to Mr. Levy's employer, requesting the production of documents to establish what Mr. Levy is paid as a salary, how that is calculated, and whether he is incentivized to seek fee awards by way of receiving additional compensation.

Discovery is additionally appropriate because Mr. Levy's factual reliability is not the best. In his brief in support of the pending motion, he misstated a fact in a manner that falsely attempts to cast defendant in a bad light. In an effort to suggest that defendant, an attorney admitted to practice before the Northern District since 1987, attempted to avoid appearing in open court in an unrelated case in order to dodge service of process, Mr. Levy made the following false statement: "***After Mr. Carreon was denied permission to argue by telephone*** *a preliminary injunction that he had filed in this district* on behalf of a client, plaintiff was ultimately able to serve Mr. Carreon outside the courtroom." (Plaintiff's Brief, 7:11-13, emphasis added.) In truth and in fact, as is readily perceived from the Docket sheet in iCall, Inc. v. Tribair, Inc., et al., Case No. 3:12-cv-02406-EMC, Mr. Carreon ***never*** applied for permission to argue the preliminary injunction by telephone. Mr. Carreon filed the motion on October 12th as Docket # 28, filed a reply brief as Docket # 35, and argued the motion on November 16th, without ever having sought permission to argue telephonically. (Carreon Dec. ¶ 13; Exhibit 6.) Docket items 31, 32 and 35 were defendant's filings, and Docket items 29 and 33 were filings by the Clerk of the Court, resetting the hearing *sua sponte*. (Exhibit 6.) If plaintiff's counsel's rendering of facts departs from the truth that can be verified in moments by accessing this Court's own digital records, defendant should not be obliged to trust the validity of any of his statements.

Taking discovery, receiving transcripts of depositions, and preparing an opposition brief will take no less than sixty days. (Carreon Dec. ¶ 14.)

Defendant has taken steps to obtain Amicus Briefs from the International Trademark Association, and from three trademark lawfirms. (Carreon Dec. ¶ 15.) Defendant will send out additional letters to additional prospective filers of Amicus Briefs. (Carreon Dec. ¶ 15.) In those letters, defendant has advised the recipients of the intent to make this ex parte application to obtain an extension of 120 days to allow those Amicus Briefs to be prepared. (Carreon Dec. ¶ 15.)

Defendant tried to resolve this matter by stipulation and was unsuccessful. (Carreon Dec. ¶ 16; Exhibit 7.)

5. Conclusion

Defendant has complied with the requisites of Local Rule 6-3 in all particulars. Prejudice would result were this Court to deny the requested extension of time. Granting the motion will not alter the timeline for resolution of the case at all, because not only have the merits been resolved, the judgment has been paid. Accordingly, good cause appears to grant the motion by granting an extension of 120 days until March 18, 2013 to file the opposition brief and any Amicus Briefs as may be solicited.

Alternatively, the Court is respectfully requested to allow 60 days until March 18, 2013 for the conduct of discovery and the preparation of the opposition brief.

Dated: January 14, 2013

CHARLES CARREON, ESQ.

s/Charles Carreon/s
CHARLES CARREON (127139)
Attorney pro se for defendant

DECLARATION OF CHARLES CARREON

Charles Carreon declares and states as follows:

1. I am an attorney licensed to practice law in the State of California, and the attorney for the defendant herein. I make this declaration on personal knowledge, and if called as a witness could and would so competently testify.

2. I am the defendant in this action. I was sued last year by plaintiff Christopher Recouvreur, represented by Paul Levy of Public Citizen to preemptively secure Mr. Recouvreur's purported right to launch a website using my name in a website domain name: Charles-Carreon.com.

3. Because Mr. Levy has chosen, throughout the litigation, to use the threat of attorney's fees accruing at the rate of $700/hr as a bargaining chip, and not because of the merits of the case, that were in no way an open-and-shut matter, I chose to tender a Rule 68 Offer of Judgment that Mr. Levy accepted, allowing the entry of a declaratory relief judgment and a judgment for costs in the amount of $725.

4. I paid the judgment. A copy of the check is attached as **Exhibit 1**.

5. Attached as **Exhibit 2** is a true copy of a scholarly article on the duty to disclose adverse authority.

6. Attached as **Exhibit 3** is the Order denying Mr. Levy's motion for attorneys' fees in *Smith v. Wal-Mart Stores, Inc.*, N.D. Georgia, Case no. 1:06-cv-526-TCB.

7. Attached as **Exhibit 4** the Order dismissing *Riley v. Dozier Internet Law,* E.D. Va. Case No. 3:08CV642-HEH, a case in which Mr. Levy filed a declaratory relief action in a "race to the courthouse" to protect his client from a Georgia trademark action filed by the Dozier Internet lawfirm.

8. Attached as **Exhibit 5** is the Memorandum Order Granting Plaintiff's Motion to Remand in *Dozier Internet Law, P.C. v. Riley,* Case No. 3:08CV643-HEH.

9. Mr. Levy has told me that if he loses this motion, he will appeal it, because he "loves to be on appeal." Accordingly, I would like every opportunity to support this motion with relevant facts to rebut the contention that this has been an "extraordinary case."

/ / /

10. Discovery should be allowed to take plaintiff's deposition to establish:

- That the operation of Charles-Carreon.com as a gripe website has not brought any substantial benefit to himself or the public;
- That he has never met defendant and conceived of animus towards defendant due to Internet postings about a case in which he was not personally involved;
- That if he had not had had an attorney to file the instant action, he would not have hired one;
- That if he had been compelled to give up the gripe website as a result of having no attorney to file this action, it would not have caused him any damage; and,
- That I engaged in no conduct that could be legally interpreted as malicious, fraudulent, or willful.

11. I would like to discover how Mr. Levy managed to turn Mr. Recouvreur into a client less than 24 hours after I sent a demand letter to Register.com to ascertain Mr. Recouvreur's identity, that was unknown to me, and presumably to the rest of the world. I sent my letter to Register.com demanding that they unmask the anonymous domain registrant on June 21, 2012, and on June 22, 2012, according to Mr. Levy's bills, he talked to Mr. Recouvreur for 1.2 hours. (Exhibit DD to Levy's Fifth Affidavit.)

12. I would like to propound a subpoena to Mr. Levy's employer, requesting the production of documents to establish what Mr. Levy is paid as a salary, how that is calculated, and whether he is incentivized to seek fee awards by way of receiving additional compensation.

13. Discovery is additionally appropriate because Mr. Levy's factual reliability is not the best. In his brief in support of the pending motion, he misstated a fact in a manner that falsely attempts to cast me in a bad light. In an effort to suggest that I, an attorney admitted to practice before the Northern District since 1987, attempted to avoid appearing in open court in an unrelated case, Mr. Levy violated Rule 11 my making the following false statement: "***After Mr. Carreon was denied permission to argue by telephone*** *a preliminary injunction that he had filed in this district* on behalf of a client, plaintiff was ultimately able to serve Mr. Carreon outside the courtroom." (Plaintiff's Brief, 7:11-13, emphasis added.) In truth and in fact, as is readily perceived from the Docket sheet in *iCall, Inc. v. Tribair, Inc*. Case No.

3:12-cv-02406-EMC, I ***never*** applied for permission to argue the preliminary injunction by telephone. I filed the motion on October 12th as Docket # 28, filed a reply brief as Docket # 35, and argued the motion on November 16th, without ever having sought permission to argue telephonically. The Docket sheet is attached hereto as **Exhibit 6**.

14. Taking discovery, receiving transcripts of depositions, and preparing an opposition brief will take no less than sixty days.

15. I have taken steps to obtain Amicus Briefs from the International Trademark Association, and from three trademark lawfirms. In those letters, I advised the recipients of my intent to make this ex parte application to obtain an extension of approximately 120 days until May 13, 2013 to allow me to obtain Amicus Briefs. Accordingly, I request that the Court extend my time to file opposition to the pending motion for 120 days, until May 13, 2013, to allow me to conduct discovery and obtain Amicus Briefs.

16. Alternatively, if the Court declines an extension of 120 days, the Court is requested to grant an extension of 63 days to March 18, 2013.

17. I attempted to resolve this matter without filing this motion. I tendered the stipulation attached as **Exhibit 7** to Mr. Levy, and he declined to sign it. He was willing to allow an extension of 30 days. I countered with a compromise proposal to accept a 45-day extension, with additional time if needed to complete discovery. He declined.

18. Wherefore, good cause exists to grant the motion and issue an order in the form submitted herewith.

I hereby declare, pursuant to the provisions of 28 U.S.C. § 1746 (2), under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Tucson, Arizona on January 14, 2013

s/Charles Carreon/s
Charles Carreon, Declarant